Advisory opinions under Protocol No. 16 to the European Convention on Human Rights

Ada Paprocka* & Michał Ziółkowski**

European Court of Human Rights – Protocol No. 16 to the European Convention on Human Rights – Protocol No. 16 as part of the European Court of Human Rights reform – Advisory opinions under Protocol No. 16 – Authority requesting an advisory opinion – The subject matter of an advisory opinion – Legal consequences of advisory opinions

Adopted on 2 October 2013 in Strasbourg, Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms[1] (henceforth: Protocol No. 16)[2] enables courts and tribunals of the states-parties to the

*Ada Paprocka M.A. (University of Warsaw), L.L.M. (Central European University) is a legal officer in the Office of the Constitutional Tribunal of Poland, e-mail: ada.paprocka@gmail.com

**Michał Ziółkowski M.A. (University of Warsaw), Currently Ph.D. candidate at the Department of Constitutional Law and European Research of the Institute of Legal Studies (Polish Academy of Sciences), member of the Polish Association of Constitutional Law, assistant to Chairman of the Committee on Legal Sciences of the Polish Academy of Sciences, judge's legal assistant at the Constitutional Tribunal of Poland, e-mail: m.ziolkowski@inp.pan.pl

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[1] Convention for the Protection of Human Rights and Fundamental Freedoms adopted on 4 November 1950 in Rome (henceforth: the Convention). The catalogue of rights guaranteed by the Convention is supplemented by protocols thereto (Protocol No. 1 adopted on 20 March 1952 in Paris, Protocol No. 4 adopted on 16 September 1963 in Strasbourg, Protocol No. 6 adopted on 28 April 1983 in Strasbourg, Protocol No. 7 adopted on 22 November 1984 in Strasbourg, Protocol No. 12 adopted on 12 November 2000 in Rome and Protocol No. 13 adopted on 3 May 2002 in Vilnius). In the present text, if not indicated otherwise, the notion of the Convention includes also those protocols.

[2] According to Art. 8(1) of Protocol No. 16, it will enter into force when ratified by 10 parties to the Convention. Current information on the states which have signed and ratified the Protocol is available at www.conventions.coe.int/, visited 23 July 2015.

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Convention to request the European Court of Human Rights (henceforth: the Court) to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the Convention. This procedure has already raised controversies.[3] On the one hand, it is claimed *inter alia* that the new procedure can increase the already long delays in the Court's work.[4] On the other hand, advisory opinions can become a useful tool of dialogue between the Court and national courts. The aim of this article is to present the changes that Protocol No. 16 introduces into the Strasbourg human rights protection system and to undertake a critical analysis of the new procedure, in particular when three questions are concerned: which bodies of power can request an advisory opinion, when the question will be admissible, and what will be the legal consequences of such an opinion.

Protocol No. 16 as part of the Court's reform

The adoption of Protocol No. 16 is part of an ongoing series of reforms of the Strasbourg human rights protection system. The idea of the reforms, initiated over a decade ago, arose mainly from the Court's overload and, in consequence, the lengthened average time of application processing as well as the significant number of applications concerning systemic violations.[5] It was also related to the planned accession of the European Union to the Convention and the need to create tools

[3] *See* e.g. K. Dzehtsiarou, 'Interaction between the European Court of Human Rights and Member States: European Consensus, Advisory Opinions and the Question of Legitimacy', in S. Flogaitis et al. (eds.), *The European Court of Human Rights and Its Discontents: Turning Criticism into Strength* (Elgar 2013) p. 116 at p. 133, and L.A. Sicilianos, 'L'élargissement de la compétence consultative de la Cour européenne des droits de l'homme – À propos du Protocole no 16 à la Convention européenne des droits de l'homme', 97 *Revue trimestrielle des droits de l'homme* (2014) p. 9 at p. 28.

[4] *See* especially K. Dzehtsiarou and N. O'Meara, 'Advisory Jurisdiction and the European Court of Human Rights: A Magic Bullet for Dialogue and Docket-control?', 34 *Legal Studies* (2014) p. 444-468 *passim*. However, the analysis presented by those authors is based significantly on the data concerning the number of references for a preliminary ruling submitted to the ECJ and does not take into consideration the distinct character of the two institutions. In our opinion it is then too pessimistic. *See also* Sicilianos, *supra* n. 3, p. 14, and J. Gerards, 'Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention on Human Rights: A Comparative and Critical Appraisal', 21 *Maastricht Journal of European and Comparative Law* (2014) p. 648.

[5] For more on the reasons for the reform of the Strasbourg system and proposed solutions *see* e.g.: A. Mowbray, 'Beyond Protocol 14', 6 *Human Rights Law Review* (2006) p. 578-584; A. Mowbray, 'Faltering Steps on the Path to Reform of the Strasbourg Enforcement System', 7 *Human Rights Law Review* (2007), p. 609-618; J.P. Rui, 'The Interlaken, Izmir and Brighton Declarations: Towards a Paradigm Shift in the Strasbourg Court's Interpretation of the European Convention of Human Rights?', 31 *Nordic Journal of Human Rights* (2013) p. 28-54, as well as Declarations of Izmir (adopted on 27 April 2011) and Brighton (adopted on 20 April 2012) – both available at <wcd.coe.int/ViewDoc.jsp?id=1781937>, visited 7 July 2014.

aimed at avoiding conflicts between the European Court of Human Rights and the Court of Justice of the European Union (henceforth: European Court of Justice).[6]

Steps aimed at solving those problems were taken both by amending the Convention, primarily with Protocol No. 14 to the Convention,[7] and in the jurisprudence of the Court – for instance by introducing pilot judgments.[8] They sought primarily to improve proceedings before the Court and to ensure higher efficiency of the protection granted at the national level. Changes in the procedure before the Court included *inter alia* the introduction of a new admissibility criterion, allowing the Court to declare an application inadmissible if the applicant has not suffered a significant disadvantage,[9] simplification of the procedure of declaring an individual application inadmissible,[10] and allowing the examination of repetitive cases by a panel of three judges instead of seven.[11] They aimed at decreasing the length of proceedings and allowing the Court to focus on cases carrying the greatest weight for the development of human rights protection standards under the Convention.[12] In terms of obligations of the states-parties to the

[6] More on the relations between the ECtHR and ECJ after Lisbon as well as in the context of EU accession to the Convention: L.F.M. Besselink, 'Should the European Union Ratify the European Convention for Human Rights? Some Remarks on the Relations between the European Court of Human Rights and the European Court of Justice', in A. Føllesdal et al. (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) p. 301-333; L.F.M. Besselink, 'The Protection of the Fundamental Rights Post-Lisbon (General Report)', in J. Laffranque (ed.), *Reports of the FIDE Congress Tallinn 2012. Vol. 1: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions* (Tartu University Press 2012) p. 1-62; J.P. Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms', 48 *Common Market Law Review* (2011) p. 995-1023; W. Weiß, 'Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon', 7 *European Constitutional Law Review* (2011) p. 64-95.

[7] Protocol No. 14 amending the control system of the Convention adopted on 13 May 2004 in Strasbourg (CETS No. 194) [henceforth: Protocol No. 14], which entered into force on 1 June 2010. For more *see*: L. Caflisch, 'The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond', 6 *Human Rights Law Review* (2006) p. 403-415.

[8] For more on pilot judgments *see* e.g.: L. Garlicki, 'Broniowski and After: On the Dual Nature of "Pilot Judgments"', in L. Caflisch et al. (eds.), *Liber Amicorum Luzius Wildhaber: Human Rights - Strasbourg Views / Droits de l'homme - Regards de Strasbourg* (Engel 2007) p. 177-192; W. Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments', 9 *Human Rights Law Review* (2009) p. 397-453; M. Fyrnys, 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights', 12 *German Law Journal* (2011) p. 1231-1259; P. Leach et al., *Responding to Systemic Human Rights Violations: An Analysis of 'Pilot Judgments' of the European Court of Human Rights and their Impact at National Level* (Intersentia 2010).

[9] Art. 35(3)(b) Convention as amended by Protocol No. 14.

[10] Art. 27 Convention as amended by Protocol No. 14.

[11] Art. 28(1)(b) Convention as amended by Protocol No. 14.

[12] *See* e.g. Declaration of Brighton, para. 33.

Convention, the emphasis was placed on the execution of judgments,[13] especially those revealing systemic problems, and the principle of subsidiarity. During the preparatory work on subsequent reforms, the primary role of states in preventing human rights violations was underlined.[14] A need for dialogue between the European Court of Human Rights and national courts (and ultimately also with the European Court of Justice) was also noted. Advisory opinions, introduced by Protocol No. 16, are supposed to be an institutionalised form of such dialogue[15] and a tool to prevent violations of individual rights from already occurring at the national level.

Advisory opinions under Protocol no. 16

Before proceeding to a thorough analysis of Protocol No. 16's main provisions, a general overview of the new procedure and its differences in comparison to the current advisory competence of the Court should be presented. The current Articles 47-49 of the Convention authorise the Court to issue advisory opinions, at the request of the Committee of Ministers, on legal questions concerning the interpretation of the Convention and the protocols thereto.[16] However, they clearly state that opinions cannot deal with the content or scope of the rights or freedoms guaranteed by the Convention or with any other question which can be the subject of any other proceeding before the Court (or the Committee of Ministers). In consequence, opinions may relate only to questions of a procedural[17] or institutional nature. They may not, however, have an impact on the development of standards of protection of rights and freedoms.[18]

[13] *Cf.* Art. 46 Convention as amended by Protocol No. 14.

[14] This tendency is well illustrated by Protocol No. 15 (adopted on 15 June 2013 in Strasbourg, not yet in force), which amends the Preamble to the Convention to mention the principle of subsidiarity.

[15] *See* e.g. Reflection Paper on the Proposal to extend the Court's advisory jurisdiction, <www.coe.int/t/dgi/brighton-conference/documents/Court-Advisory-opinions_en.pdf>, visited 5 July 2014, para. 4 and 10. For more on the objectives of Protocol No. 16 *see* Gerards, *supra* n. 4, p. 631-632, 637 ff.

[16] The Court was granted the jurisdiction to issue advisory opinions by Protocol No. 2 adopted on 6 May 1963 in Strasbourg (CETS No. 044), which entered into force in 1970. The current wording of Art. 47-49 of the Convention was established by Protocol No 11 adopted on 11 May 1994 in Strasbourg (CETS No. 155), which entered into force in 1998.

[17] As long as they might not be decided when examining a case. *See*: decision on the competence of the Court to give an advisory opinion of 2 June 2004, in which the Court decided that it did not have the competence to issue an opinion on the coexistence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights. The ECtHR stated in particular that it could not decide whether a complaint submitted to the Human Rights Commission of the Commonwealth of Independent States constituted 'another procedure of international investigation' mentioned in Art. 35(2)(b) of the Convention as this question may arise in future cases pending before the Court.

[18] So far the Court has issued only two advisory opinions. Both concerned issues related to the procedure for election of judges (advisory opinion on certain legal questions concerning the lists of

The provisions introduced by Protocol No. 16 provide that advisory opinions will be issued, at the request of national courts and tribunals of parties to the Convention, on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention.[19] Protocol No. 16 thus broadens the scope of advisory opinions and establishes a new type of ruling relevant to the Strasbourg system of human rights protection. It also introduces new actors – national courts and tribunals – in proceedings before the Court. Formulating a request for an advisory opinion will be possible only in the context of a case pending before a given judicial body. According to Article 2 of Protocol No. 16, the decision whether to accept the request for an advisory opinion will be made by a panel of five judges of the Grand Chamber, and if the request is granted the opinion will be issued by the Grand Chamber.

The Council of Europe Commissioner for Human Rights, the party to the Convention whose court requested the opinion, and, at the invitation of the President of the Court, other parties to the Convention or other persons[20] will have a possibility to take part in the proceedings. The procedure for issuing an advisory opinion is therefore similar to the current procedure for examination of an individual application by the Grand Chamber. However, unlike in the procedure of deciding on an individual application, in this procedure both the refusal to accept the request for an advisory opinion and the opinion itself must be reasoned. Advisory opinions will not be binding. Delivery of an advisory opinion in the course of proceedings before a national court or tribunal will also not impede the right of an individual application of a person who alleges that despite obtaining an advisory opinion by the national court of tribunal, their rights were violated.[21]

Authority requesting an advisory opinion

Article 1(1) and Article 10 of Protocol No. 16 provide that those authorised to request an advisory opinion are the highest courts and tribunals of parties to the Convention, which should be listed by the parties to the Convention in the

candidates submitted with a view to the election of judges to the European Court of Human Rights of 12 February 2008 and advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights [No. 2] of 22 January 2010).

[19] Art. 1(1) Protocol No. 16.

[20] Art. 3 Protocol No. 16 states that another party to the Convention or other person may be invited to take part in the proceedings (by submitting written comments or taking part in a hearing) when it is 'in the interest of the proper administration of justice'.

[21] *See*: Opinion of the Court on Draft Protocol No. 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention, adopted on 6 May 2013, <www.echr.coe.int/Documents/2013_Protocol_16_Court_Opinion_ENG.pdf>, visited 5 July 2014, para. 12.

declaration submitted with the ratification documents.[22] Qualification of a national body as entitled to request an opinion requires answering three questions: firstly, whether the given body constitutes a court or tribunal in the meaning of the Convention; secondly, whether legal norms establishing the given body's position in the structure of national bodies of power put it on the top of the hierarchical structure of competence in the given legal system; and thirdly, whether questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention can arise in a proceeding before this body. Moreover, the legal nature of the states-parties' declaration should be determined in order to establish whether only the bodies indicated by states can request an opinion or whether states are obliged to list all the bodies which meet the above criteria; in case of any omissions on their part, the Court can independently examine whether a certain national body is authorised to request an opinion.

In relation to the first question, in both the preparatory works and the literature it is emphasised that advisory opinions can be requested only by courts or tribunals. Consequently, parties to the Convention cannot indicate other authorities applying the Convention (such as administrative bodies or extrajudicial bodies of human rights protection) as authorised to request an opinion.[23] In our opinion, determining whether a given body can be classified as a court or tribunal under Article 1 of Protocol No. 16 should be based on the current understanding of this notion under Article 6 of the Convention.[24] According to Article 6 of Protocol No. 16, its provisions should be considered an integral part of the Convention. They should therefore be interpreted in the light of the established understanding of the notions used in the Convention.

With regard to the second question, it should be noted that the preparatory works on Protocol No. 16 indicate that the notion of highest courts and tribunals should be read as including courts which can be considered the highest in cases of a particular type, even if formally they are subject to the supreme or constitutional court and their decisions can be the subject of a constitutional complaint.[25]

[22] Declarations may then be modified by the unilateral declaration of a party to the Convention.

[23] *See* e.g. P. Gragl, '(Judicial) Love is Not a One-Way Street: The EU Preliminary Reference Procedure as a Model for ECtHR Advisory Opinions under Draft Protocol No 16', *38 European Law Review* (2013) no. 3 <ssrn.com/abstract=2305803>, visited 5 July 2014, p. 4.

[24] For more on the notion of a court or tribunal under the Convention *see* e.g. CH. Grabenwarter, *European Convention on Human Rights: Commentary* (Beck, Hart, Nomos Helbing Lichtenhahn Verlag 2014) p. 113-116; P. Hofmański and A. Wróbel, notes to Art. 6 in L. Garlicki (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, t.1, Komentarz do artykułów* 1-18 [*Convention for the Protection of Human Rights and Fundamental Freedoms, vol. 1, Commentary to articles 1-18*] (Beck 2010) p. 309-311.

[25] Explanatory Report to Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 214) para. 8. At the same time the Report points out the need to limit the number of bodies authorised to request an advisory opinion in order to avoid a

It is also emphasised that it does not necessarily mean the bodies to which recourse must be made in order to exhaust domestic remedies before filing an application to the Court.[26] In our opinion, taking into consideration the aim of advisory opinions – ensuring dialogue at the level of the highest judicial authorities – the notion of highest courts and tribunals should be analysed from two perspectives: procedural and institutional. On the one hand, the only courts authorised to request an advisory opinion will be those which finally decide cases of a particular category. On the other hand, it should be the courts whose position and competences enable them to have a genuine impact on shaping human rights standards in a particular country. When assessing fulfilment of this criterion one should additionally take into account the criterion of final decision on the applicant's rights and freedoms in the meaning of Article 35(1) of the Convention.

Considering the subject matter of the opinions, it is also clear that a body requesting an opinion has to satisfy a third criterion: being a body before which questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention can arise. From the point of view of the Convention, which assumes that all state bodies are required to adhere to human rights standards guaranteed by it, the fulfilment of this condition by any body deciding on individual cases should not be brought into doubt. This is also the view of many domestic legal systems. For instance the Polish legal system provides that the Convention constitutes a part of the national legal system, should be applied directly and takes precedence before statutes. It is also recognised that the content of rights and freedom guaranteed by the Convention should be determined on the basis of both its text and the jurisprudence of the Court.[27]

proliferation of requests and to ensure that the dialogue between courts will take place at the appropriate level.

[26] For instance it would be possible for a supreme court (or the highest administrative court) to request an opinion even though in a given case a party wishing to file an individual application would be required under Art. 35(1) of the Convention to bring a constitutional complaint (*cf.* ECtHR 9 October 2003, Case No. 47414/99, *Szott-Medyńska* v *Poland* (admissibility decision), and ECtHR 16 March 2010, Case No. 14337/02, *Liss* v *Poland* (admissibility decision)). *See also* Explanatory Report, *supra* n. 25, para. 8.

[27] *See* Art. 91 in conjunction with Art. 9 Konstytucja Rzeczypospolitej Polskiej [*Polish Constitution*]. *See also* e.g. L. Garlicki, 'Konstytucja Rzeczypospolitej Polskiej z perspektywy Europejskiego Trybunału Praw Człowieka' [*Constitution of the Republic of Poland from the Perspective of the European Court of Human Rights*] in Z. Maciąg (ed.), Stosowanie Konstytucji RP z 1997 roku – doświadczenia i perspektywy [*Application of the 1997 Polish Constitution: Experiences and Perspectives*] (Oficyna Wydawnicza AFM 2006) p. 43 at p. 45. For more on the position of the Convention in particular states *see* e.g. R. Blackburn and J. Polakiewicz (eds.), *Fundamental Rights in Europe: The European Convention on Human Rights and Its Member States 1950-2000* (Oxford University Press 2001), and H. Keller and A. Stone-Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008).

Conversely, this criterion will not be met by bodies which do not decide on the rights or obligations of individuals – for example bodies that resolve conflicts between bodies of state or local power, which are not subjects of rights and freedoms guaranteed by the Convention.

Taking the foregoing into account, the competence of constitutional courts to request advisory opinions in general does not seem controversial. These courts widely recognise the Convention as a direct as well as indirect source of reference.[28]

Some controversies may arise, however, concerning procedures in the context of which constitutional courts can request an advisory opinion and concerning the subject matter of the case pending before those courts which would mandate such a request. The first question concerns whether the case to which the request is related has to be of an individual nature[29] or whether it may concern abstract review of legislation. The second question is related to whether an advisory opinion may be requested only in cases in which the constitutional court is assessing the conformity of a national decision or legislation with the Convention,[30] or also in cases which formally concern only the constitutionality of certain laws or decisions, but in which the constitutional court wishes to refer to standards adopted under the Convention as a tool to ensure consistent interpretation of the Convention and national constitutional provisions.[31]

In our opinion, the aims of the new advisory opinions procedure and the need to ensure the effectiveness of the new procedure mandate a wide understanding of the catalogue of procedures in which constitutional courts may request advisory opinions. Therefore there is no reason to understand the notion of 'case' used in Article 1(2) of Protocol No. 16 as excluding abstract review of legislation conducted by constitutional courts, as results of such proceedings have a significant impact on the level of human rights protection on the national level. In such cases, the requesting court's obligation to provide the legal and factual background of the case should include the legal, political and social context of adoption and application of the particular legislation.

[28] L. Garlicki, 'Cooperation of Courts: The Role of Supranational Jurisdictions in Europe', *International Journal of Constitutional Law* (2008) no. 3-4 p. 509-522; E. Bjorge, 'National Supreme Courts and the Development of ECHR Rights', *International Journal of Constitutional Law* (2011) no. 1 p. 5-31; W. Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford 2012) p. 27-33.

[29] Concrete review of legislation or constitutional complaint (notwithstanding if in a particular legal system it may concern only unconstitutionality of legislation or also of the application of law).

[30] A constitutional court's competence to decide on the conventionality of law is quite rare, but is provided for e.g. in the constitutions of Bulgaria, Poland, Slovakia and Slovenia.

[31] For more on such an interpretation of national constitutions *see* e.g. H. Keller and A. Stone-Sweet, 'Assessing the Impact of the ECHR on National Legal Systems', in Keller and Stone-Sweet (eds.), *supra* n. 27, p. 683-688; Sadurski, *supra* n. 28, p. 23-24.

There is also no need to limit the scope of cases in which an advisory opinion may be requested to those in which the Convention constitutes the formal legal basis for a national decision. Taking into consideration the number of similarities between the Convention and national provisions on fundamental rights adopted in European states, and the necessity to ensure a consistent interpretation of human rights standards enforced at both the national and European levels, the formal basis of adjudication should be of lesser significance than the opinion of the national body that an explanation of a question relating to the interpretation or application of the Convention can be useful for adjudication of a particular case. It should be primarily for the national court to decide whether the opinion on the Convention standard of protection is necessary to decide the issue before it.[32]

What the legal nature is of the declarations of state parties indicating the courts and tribunals authorised to request an advisory opinion remains an open question. The preparatory works and a few opinions expressed in the literature indicate that the declaration is of constitutive significance for the competence of a given body to submit a request. The drafters of Protocol No. 16 intended the final decision as to which national bodies are authorised to request an advisory opinion to be left to the parties to the Convention.[33] Such an interpretation of the role of the declaration is supported by a literal reading of Articles 1(1) and 10 of Protocol No. 16.

However, in the light of the principle of autonomous interpretation of notions used in the Convention, one may claim that the declaration does not have a constitutive character and the parties to the Convention are obliged to indicate all the bodies that under applicable national regulations meet the criteria of a body authorised to request an advisory opinion. According to this interpretation, the declaration submitted under Article 10 of Protocol No. 16 is informative in nature and does not limit the Court's competence to determine whether the conditions for requesting an advisory opinion set forth in Protocol No. 16 were met in the factual and legal circumstances of a particular case.[34]

[32] It should be noted, however, that due to the different scopes of constitutional courts' jurisdiction and the diversity of statutory regulations, from a national perspective some additional factors may be of relevance for deciding whether an opinion can be requested in a particular procedure. Firstly, the national evidence regulations may determine the question whether advisory opinion proceedings shall be instituted at the court's own initiative or at the request of the parties to the proceedings only. Secondly, the constitutional distinction between *ex-ante* and *ex-post* constitution review may limit the application of the advisory opinion procedure only to *ex-post* hierarchical control of norms.

[33] Critically about this solution: Dzehtsiarou and O'Meara, *supra* n. 4, p. 20, and A. Ploszka, 'Nowa opinia doradcza Europejskiego Trybunału Praw Człowieka' [*New Advisory Opinion of the ECtHR*], *Państwo i Prawo* (2013) no. 10 p. 97.

[34] In this context, one may claim that Art. 10 of Protocol No. 16 creates a basis for the presumption that a body indicated in the declaration of a party to the Convention is authorised to

Considering Article 1 in conjunction with Articles 19 and 32 of the Convention and the international nature of judgments of the Court, determining the scope of the bodies falling within the ambit of Article 1(1) of Protocol No. 16 requires taking into account the principles typical for international obligations.[35] The Convention does not contain rules specifying the methods for interpreting the Convention. Therefore, decoding the meaning of notions used in the Convention and the content of the obligations of the parties to the Convention requires one to resort to the principles of treaty interpretation adopted in the law of treaties[36] and draw general conclusions as to the meaning of the norms of the Convention from the case-law of the Court.[37]

The declaration in question is a unilateral statement by a state-party to the Convention listing the bodies of state power that in the current national legal order are authorised to request an advisory opinion. As an additional document of an executive nature, it is separate from the international agreement. It does not constitute an integral part of this agreement and cannot be considered equivalent to reservations in the sense of the law of treaties. As a consequence, it cannot modify the content of the agreement. Article 1(1) of Protocol No. 16 constitutes an additional article to the Convention, to which all its provisions should apply accordingly under Article 6 of Protocol No. 16. Delimiting the array of bodies authorised to request an advisory opinion should then be subject to the principle

request an opinion and a body not mentioned in such declaration does not fall within the scope of Art. 1(1) of Protocol No. 16. However, this presumption can be rebutted in the course of proceedings before the ECtHR.

[35] L. Garlicki, note 2 to Art. 46 in L. Garlicki (ed.), Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. T. 2 Komentarz do artykułów 19-59 oraz Protokołów dodatkowych [*Convention for the Protection of Human Rights and Fundamental Freedoms, vol. 2, Commentary to Articles 19-59 and Additional Protocols*], (Beck 2011) p. 353.

[36] It should be noted especially as follows: First, under Art. 31(1) of the 1969 Vienna Convention on the Law of Treaties, the object and purpose of the Convention should be given more significance than its literal reading. Second, considering the normative character of a treaty aimed at human rights protection, in case of the Convention there are no grounds to apply a rule according to which all ambiguities should be interpreted in favour of limiting states' obligations. On the contrary, interpretation should be based on the principle of effectiveness. Third, when determining the scope of obligations of parties to the Convention and competences of the institutions of the Council of Europe, one should treat the principle of subsidiarity of the Convention system as a starting point. (For more on the interpretation of the Convention *see also* F. Matscher, 'Methods of Interpretation of the Convention', in R.S. Macdonald et al. (eds.), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers 1993), p. 63-81; L. Garlicki, 'The methods of interpretation', in. F. Mélin-Soucramanien (ed.), *L'interprétation constitutionnelle* (Dalloz 2005) p. 139-153, and L. Wildhaber, 'The European Convention on Human Rights and International Law', 56 *International and Comparative Law Quarterly* (2007) no. 2 p. 217-232.)

[37] For more on inductive interpretation of the Convention *see* C. Mik, Koncepcja normatywna prawa europejskiego praw człowieka [*Normative Conception of the European Human Rights Law*] (Comer 1994) p. 226-238.

of subsidiarity as well as the interpretative monopoly of the Court, under Article 19 in conjunction with Article 1 of the Convention. Granting a constitutive character to states' declarations would enable states to modify the meaning of the Convention, including the scope of the Court's jurisdiction, by a unilateral act driven by current political circumstances.[38]

While currently the first of the presented understandings of the declarations submitted under Article 10 of Protocol No. 16 predominates, in the light of extensive criticism of this solution in the literature and the Court's tendency to interpret the Convention autonomously, it seems possible and appropriate that as the case-law develops, it will be established that the states' declarations have only a declaratory nature.

The subject matter of an advisory opinion

According to the last part of Article 1(1) of Protocol No. 16, a request for an advisory opinion can be submitted only in 'questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.'

The notion of 'interpretation', according to the branch of law and the subject of analysis, can be understood in different ways.[39] It may be equated, on the one hand, with the process of decoding the meaning of legal provisions, and on the other hand with the result of this process. Depending on the assumed understanding of this notion, a request concerning interpretation could relate to the norms containing particular rights and freedoms and metanorms determining the application of those norms (for examples norms/directives of interpretation and conflict-of-law rules) or be limited to decoding the content of norms guaranteeing particular rights and freedoms. In our opinion, taking into account the objective of advisory opinions and the preparatory works, the notion of interpretation under Article 1(1) of Protocol No. 16 should be understood as the result of the process of interpretation. Consequently, the request for an advisory opinion should be aimed at determining the scope of rights and freedoms guaranteed by the Convention, their content and permissible limitations.

[38] The possibility of modifying the declaration, provided by Art. 10 of Protocol No. 16, is necessary if the array of bodies authorised to request advisory opinions changes as a result of changes in domestic legal systems (especially regarding the competences or institutional setting of the judiciary).

[39] For more *see* M. Zieliński, Wykładnia prawa. Zasady, reguły, wskazówki [*Interpretation of Law: Principles, Rules, Instructions*] (Lexis Nexis 2012) p. 48 ff. *See also* H. Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System* (Intersentia 2011) p. 7, and G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford 2009).

The notion of 'application' under Article 1(1) of Protocol No. 16 should be understood as determining whether a particular type of case falls within the subjective, objective and temporal scope of the norm decoded from the Convention. Thus it does not refer to the traditionally understood notion of applying law to fact (subsuming particular factual circumstances under a given legal norm), but the applicability of norms to a given category of factual circumstances. It is up to the national court to determine the facts of the case and issue a binding decision on the legal consequences of those facts.[40] A request for an advisory opinion cannot aim to transfer the dispute to the Court; the only aim can be to let the Court determine whether a particular right or freedom guaranteed by the Convention is applicable to the given category of factual circumstances identified by the national court.[41]

Irrespective of whether the question raised in the request relates to interpretation or application of the Convention, it may only refer to provisions containing rights and freedoms. Opinions cannot settle questions referring to procedural and institutional issues regulated by the Convention and its Protocols.[42]

In this connection, the question may be raised of whether national courts and tribunals can request an advisory opinion concerning interpretation or application of Article 46(1) of the Convention regulating the execution of Court judgments. On the one hand, the structure and literal reading of the Convention weigh against such a solution. On the other hand, some authors claim that Article 46(1) of the Convention defines a right to the execution of judgments,[43] which would

[40] For more on the model of application of the law *see* J. Wróblewski, *The Judicial Application of Law* (Kluwer Academic Publishers 1992).

[41] For example, a national court may request an opinion as to whether the Convention applies to a certain type of extraterritorial action of the state (territorial scope of application of the Convention) or to certain factual circumstances which are rooted in state actions from before the adoption of the Convention (temporal scope of application of the Convention), but cannot expect the ECtHR to determine whether a particular action of the state resulted in violation of an individual right or freedom.

[42] The scope of advisory opinions under Protocol No. 16 is therefore separate from the scope of advisory opinions issued at the request of the Committee of Ministers under Art. 47-49 of the Convention. *See also* Report of the Group of Wise Persons to the Committee of Ministers of 15 November 2006, CM(2006)203 para. 83; Reflection Paper, *supra* n. 15, para. 27.

[43] N. Pawłowska, 'Wznowienie postępowania po korzystnym dla strony wyroku ETPC – glosa do postanowienia SN z 23.10.2008 r. (V CO 28/08)' [*Reopening of Proceedings after ECtHR Judgment Favourable to a Party: Commentary on Supreme Court of Poland Order of 23 October 2008 (Case V CO 28/08)*], *Europejski Przegląd Sądowy* (2010) no. 2 p. 48-49; *see also* the proposal of A. Sledzińska-Simon, 'Naruszenie prawa do sądu jako podstawa wzruszenia postępowania cywilnego z powodu nieważności – glosa do postanowienia SN z 17.04.2007 r. (I PZ 5/07)' [*Infringement of the Right to Trial as Grounds for Setting Aside Civil Proceedings for Invalidity: Commentary on Supreme Court of Poland Order of 17 April 2007 (Case I PZ 5/07)*], *Europejski Przegląd Sądowy* (2009) no. 2 p. 42 ff.

lead to the conclusion that a request concerning the binding force and execution of judgments would be admissible.

In our opinion, Article 46(1) of the Convention does not formulate a subjective right,[44] and therefore its interpretation and application cannot be the subject of an advisory opinion. At the same time, however, the execution of a previous judgment of the Court can be of significance for ensuring that a right or freedom defined in the Convention is respected. It may lead to another violation of the Convention with respect to the applicant[45] or be significant for ensuring that similar violations do not occur in future in the given legal system.[46] In such a situation, requesting an advisory opinion would be admissible. The subject would be interpretation or application of a provision guaranteeing a right or freedom in the light of the obligation to execute an already pronounced judgment of the Court.

A question that can be the subject of an opinion must also be a question 'of principle'. To determine the meaning of this criterion, the perspective of assessment must first be determined, namely whether the question should be significant for the national legal system (a domestic perspective) or for the development of the Convention's system of human rights protection (the perspective of the Convention). On the one hand, advisory opinions are supposed to facilitate the adjudication of individual cases pending before national courts and tribunals and serve as a tool for solving domestic problems which arise in the

[44] For more on the justification of this opinion, *see* M. Ziółkowski, 'Obowiązek przestrzegania wyroków Europejskiego Trybunału Praw Człowieka w świetle art. 46 Konwencji o ochronie praw człowieka i podstawowych wolności oraz rezolucji Zgromadzenia Parlamentarnego Rady Europy z 26 stycznia 2011 r. 1787 (2011)' [*Obligation to Comply with Judgments of the European Court of Human Rights in the Light of Art. 46 of the Convention and Parliamentary Assembly Resolution 1787 (2011) on Implementation of Judgments of the European Court of Human Rights*], in Wykonywanie wyroków Europejskiego Trybunału Praw Człowieka przez Sejm [*Execution of ECtHR Judgments by the Sejm*] (BAS 2012) p. 26-29.

[45] *See* e.g. ECtHR 30 June 2009, Case No. 32772/02, *Verein gegen Tierfabriken Schweiz (VgT)* v *Switzerland (no. 2)*, para. 86 (*see also* M. Hertig Randall and X.-B. Ruedin '"Judicial Activism" et exécution des arrêts de la Court européenne des droits de l'homme', 82 *Revue Trimestrielle des droits de l'homme* (2010) p. 421-443. But *see* ECtHR 11 May 2010, Case No. 29061/08, *Steck-Risch et al.* v *Liechtenstein* (decision on admissibility) and ECtHR 6 July 2010, Case No. 5980/07, *Öcalan* v *Turkey* (decision on admissibility)).

[46] For more *see* A. Paprocka, 'Wpływ orzecznictwa ETPCz na rozumienie konstytucyjnych praw i wolności w Polsce – kilka uwag na marginesie orzecznictwa Trybunału Konstytucyjnego' [*The Influence of the ECtHR's Jurisprudence on the Understanding of Fundamental Rights in Poland: A Few Remarks Related to the Constitutional Tribunal's Case-Law*] in M. Zubik (ed.), XV lat obowiązywania Konstytucji z 1997 r. Księga jubileuszowa dedykowana Zdzisławowi Jaroszowi [*15 Years of the 1997 Constitution's Being in Force: Liber amicorum Dedicated to Zdzisław Jarosz*] (Wydawnictwo Sejmowe 2012) p. 76-89, and literature cited there. *See also* the judgment of the Constitutional Tribunal of Poland of 18 October 2004, Case P 8/04.

process of implementation of the standards of protection required by the Convention.[47] On the other hand, the procedure for advisory opinions is supposed to contribute to the development of jurisprudence and enable clarification of issues which cause problems in several states-parties to the Convention.[48] Therefore the significance of the question raised in a request submitted under Article 1 of Protocol No. 16 should be assessed from both perspectives; one can assume that if the matter in question is important from one of those perspectives that should be enough to accept the request for examination by the Grand Chamber.

In favour of the domestic perspective in the assessment of the significance of the question raised in a request for an advisory opinion, it can be pointed out that the Protocol No. 16 procedure was designed as a particular way to strengthen the interaction between the Court and the national authorities, in accordance with the principle of subsidiarity.[49] The preparatory work materials clearly indicate that requests should focus on the conformity with the Convention of national substantive and procedural norms as well as norms of competences applicable in the particular case (providing that it would not lead to abstract review of norms).[50] The Court therefore should not automatically refuse requests strictly related to matters of a regional or national nature or concerning legal problems that could arise in just one or a few legal systems. The opinions in such matters can serve as tools to resolve systemic problems contributing to numerous violations of rights and freedoms.[51]

The Convention perspective in assessing the subject of advisory opinions is justified by the role of the opinions in explaining and developing human rights standards. It is also related to the importance of the opinions, as statements by the Grand Chamber, which should harmonise the Court's case-law.

In determining the scope of the request for advisory opinions, the current understanding of the conditions for referral to the Grand Chamber specified in Article 43(2) of the Convention should also be taken into account.[52]

[47] Reflection Paper, *supra* n. 15, para. 2.

[48] Reflection Paper, *supra* n. 15, para. 30-31.

[49] Preamble Protocol No. 16. For more on the different meanings of subsidiarity under the Convention, *see* J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden-Boston 2009) p. 230-236 and 354-356.

[50] Reflection Paper, *supra* n. 15, para. 29-30; Explanatory Report, *supra* n. 25, para. 9.

[51] In this sense, the role of opinions may be similar to that of pilot judgments in which the Court indicates the need to resolve systemic problems (for more *see* Garlicki, *supra* n. 8, p. 177-192; Leach, *supra* n. 8, *passim; see also* ECtHR 15 January 2009, Case No. 33509/04, *Burdov* v *Russia (no 2)*, § 123-128). Current experiences indicate that pilot judgments can contribute to the effective solution of problems arising in a given national legal system, especially when they go hand in hand with actions taken by national courts (for more *see* Sadurski, *supra* n. 8, p. 397-453).

[52] Explanatory Report, *supra* n. 25, para. 9.

One of the consequences of the incorporation of Article 1 of Protocol No. 16 into the Convention is an obligation to interpret this provision in accordance with the content and aim of other legal institutions regulated by the Convention. It should be noted that Article 43(2) of the Convention and Article 1 of Protocol No. 16 use similar terms – 'serious question' and 'questions of principle' respectively. This reference in the interpretation is also supported by the requirement for consistency in the Grand Chamber's competences[53] and the fact that the advisory opinion procedure is based on the procedure of referral to the Grand Chamber.[54]

A different interpretation, based on the assumption of the procedural autonomy of the panel of judges and the Grand Chamber and the lack of a substantive link between the criteria for referral to the Grand Chamber and the conditions for advisory opinions, would lead to a broad scope of discretion for the five-judge panel in defining the concept of 'questions of principle'. This could also present an obstacle in the opinions' aim to enhance dialogue between the Court and the supreme/highest courts or tribunals.

Taking into consideration the current understanding of Article 43(2) of the Convention and its role in interpretation of Protocol No. 16, one should make four reservations. Firstly, the scope of this provision is broader than the scope of the provision on advisory opinions in the light of Protocol No. 16. According to Article 43(2) of the Convention, a case can be submitted to the Grand Chamber when it 'raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance.' As mentioned above, the request for an advisory opinion cannot deal with issues unrelated to the protection of rights and freedoms. Secondly, under Article 43(2) of the Convention, the importance of the matter being referred to the Grand Chamber shall be primarily determined from the perspective of the Convention. It is assumed that the proceedings before the Grand Chamber are focused on the principles of the European human rights system, not on the problems of only one or a few national legal systems.[55] As argued above, in the case of advisory opinions there is no reasonable justification for such limitations and exclusion of the national perspective.

[53] There is no need to refer to Art. 30 of the Convention because the conditions for submitting the case to the Grand Chamber are closely related substantively to the conditions under Art. 43(2) of the Convention (for more *see* L. Garlicki, note 8 to Art. 43, in Garlicki (ed.), *supra* n. 35, p. 335). An argument could be raised against analogous application of Art. 30 of the Convention that this only provides for an internal procedure of the Court, while Art. 43(2) of the Convention (just like Art. 1 in conjunction with Art. 2(2) of Protocol No. 16) refers to the request submitted by an external entity.

[54] Art. 2 (1) and (2) in conjunction Art. 1(1) of Protocol No. 16 can be reduced to the claim: the five-judge panel shall accept the request when the particular case includes an important question affecting the interpretation or application of the rights and freedoms defined in the Convention and its Protocols.

[55] *See* L. Garlicki, notes to Art. 43, in Garlicki (ed.), *supra* n. 35, p. 336.

Thirdly, in light of Article 43 of the Convention, the five judges' decision to refuse the referral to the Grand Chamber does not require justification. Therefore the meaning of the criteria established in this provision has so far been reconstructed solely on the basis of the subject matters actually adjudicated by the Grand Chamber. Only Article 2(1) in fine of Protocol No. 16 establishes the necessity for an authoritative explanation of 'questions of principle' by the Court itself.[56] Fourthly, after accepting the request, in light of Article 43 of the Convention the Grand Chamber is obliged to reconsider the case as a whole, not only the 'serious question' raised thereby.[57] According to the wording of Protocol No. 16, the Grand Chamber's jurisdiction is limited to the question submitted by the national supreme court or tribunal. The scope of the Grand Chamber's opinion will therefore be narrower than the scope of the judgment issued under Article 43 of the Convention.

Taking into account Court case-law and the opinions expressed on the grounds of Article 43(2) of the Convention,[58] it can be argued that 'questions of principle' (within the meaning of Article 1(1) of Protocol No. 16) would be found particularly in cases where the request for an advisory opinion addresses: a) new and unresolved matters in the interpretation or application of the Convention, b) inconsistency in previous case-law, or c) the continuing validity of the Court's opinion that was expressed in the case-law and never changed but can be re-examined in light of the doctrine of the Convention as a 'living instrument'.[59] We are also of the opinion that Article 1(1) of Protocol No. 16 does not entitle national courts or tribunals to request advisory opinions seeking to resolve: a) issues that raise no doubts as to the merits under the Court's case-law, b) similarities between facts or legal issues pending before the court and ones previously ruled on by the Court, or c) matters of identification and assessment of the facts in the cases pending before the national court.

Legal consequences of advisory opinions

According to Article 5 of Protocol No. 16, advisory opinions are 'non-binding'. There is no doubt that they have no validity in the national proceedings.

[56] More on the obligation to give reasons for refusal of a request for an advisory opinion: Gragl, *supra* n. 23, p. 13.

[57] *See* ECtHR 12 July 2001, Case No. 25702/94, *K. & T.* v *Finland,* § 140.

[58] For more *see* Garlicki, *supra* n. 55, p. 335.

[59] For more about this concept *see* A. Mowbray, 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law', *Human Rights Law Review* (2009) no. 2 p. 193-198; K. Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights', *German Law Journal* (2011) no. 10 p. 1730-1745, and A. Paprocka, 'Budowanie tożsamości europejskiej w orzecznictwie Europejskiego Trybunału Praw Człowieka' [*Building a European Identity in the Jurisprudence of ECtHR*], *Państwo i Prawo* (2014) no. 12 p. 24-27.

Opinions do not create an obligation to execute them within the meaning of Article 46 of the Convention. However, the laconic wording of Protocol No. 16 allows commentators to take different positions regarding the importance of these advisory opinions in the judicial process of applying law.

On the one hand, it could be argued that Article 5 of Protocol No. 16 is a comprehensive regulation of the legal consequences of advisory opinions. Therefore the requesting court or tribunal, as well as the Strasbourg Court itself, shall not be bound in a procedural or substantive way by the opinions. Apart from the clear wording of this provision and the origin of advisory opinions as an international document of soft law, the conclusion about the 'non-binding' character of the advisory opinion can also be supported by the preparatory works. It should also be noted that the only Convention provision which is related to the binding force of Court rulings refers to judgments only. It therefore cannot be directly applied to other types of rulings by the Court. Moreover, advisory opinions display a similarity to opinions in the meaning of Article 47 of the Convention, which are also non-binding in a legal sense, have mainly political significance and oblige their addressees only to consider the Court's position.[60] According to this point of view, the consequences of advisory opinions can be described as purely consultative.

On the other hand, one can argue that Article 5 of Protocol No. 16 is not a comprehensive regulation of the legal consequences of advisory opinions, but constitutes an element of a broader regulation that imposes specific legal obligations on national authorities (under Article 32(1) in conjunction with Article 1 of the Convention). This point of view is based on the fact that Article 5 of Protocol No. 16 will be incorporated into the Convention, and as a consequence must be understood in accordance with other Convention rules and principles. The non-binding nature of opinions, in the sense of national procedural or substantive law, must be separated from the impact of Court judgments and decisions on the judicial process of the application of law. It should be pointed out, however, that advisory opinions, like other rulings of the Court (judgments and decisions), provide an authoritative statement by the Court on the standard of protection of the rights and freedoms guaranteed by the Convention. Such a standard should be taken into account in the process of interpretation of the law by courts or tribunals within the scope of their competence.[61] Under Article 32(1)

[60] I. Kondak, note 5 to Art. 47-49, in Garlicki (ed.), *supra* n. 35, p. 418.

[61] For more in the context of the ECtHR's judgments, *see* Polish Constitutional Tribunal judgment of 15 July 2010, Case K 63/07, OTK ZU/3/A/2010/60, Polish Constitutional Tribunal judgment of 3 March 2005, Case P 8/03, OTK ZU/3/A/2005/20, and Gerards, *supra* n. 4, p. 635-636. For more on different aspects of being bound by Strasbourg standards, *see also* M. Krzyżanowska-Mierzewska, 'The Reception Process in Poland and Slovakia', in Keller and Stone-Sweet, *supra* n. 27, p. 543-548.

in conjunction with Article 1 of the Convention, all courts and tribunals are obliged to consider and apply the Court's position on the interpretation of the Convention.

Sharing the second point of view mentioned above and considering that the Court's judgments, decisions and opinions can have a different and specific impact on the national legal order (depending on the context, the circumstances of the case and the branch of law concerned),[62] we would like to underline that advisory opinions, like a Court judgment on a violation of individual's rights, should be 'transcribed' by the authorities with consideration for the particularities of the given national legal system.[63] In consequence, the interpretational force of an opinion of the Court does not carry over automatically to the assessment of the legality of the national court or tribunal's final decision (if it conflicts with the advisory opinion). Having regard to the origins of international law and the legal grounds and scope of advisory opinions, we would deny the opinions direct legal effect in proceedings for civil liability for judicial decisions.[64]

However, Article 5 of Protocol No. 16 does not undermine the requesting court or tribunal's obligation to prevent a violation of individuals' rights or its obligation to interrupt an ongoing violation identified by the Court in its advisory opinion (within the scope of its competence under national law). Article 5 of Protocol No. 16 also cannot be read as a basis for the requesting judicial body's competence to contest the subjective, substantive or temporal scope of Convention standards adopted in the Court's opinions. The obligation to adopt the Court's point of view on those matters stems from the Court's monopoly on the interpretation of the Convention established by Article 32 of the Convention. As a result, national authorities are bound by the dynamic standard of human rights protection expressed in the Court's current case-law. In our opinion, there is no reason not to apply this provision accordingly to the views expressed in the procedure established by Protocol No. 16.

The non-binding nature of the Court advisory opinions does not stand in the way of non-requesting courts or tribunals interpreting national law in accordance

[62] For more in the context of the ECtHR's judgments *see* E. Łętowska, 'Zapewnienie skuteczności orzeczeniom sądów międzynarodowych' [*Ensuring the Effectiveness of International Courts' Judgments*], in A. Wróbel (ed.), *Zapewnienie efektywności orzeczeń sądów międzynarodowych w polskim porządku prawnym* [*Ensuring the Effectiveness of International Courts' Judgments in the Polish Legal System*] (Wolters Kluwer 2011) p. 48.

[63] For more on transcription of the Court's judgments into the national legal order, *see* Keller and Stone-Sweet, *supra* n. 31, p. 682-688.

[64] For more *see* M. Ziółkowski, 'Wyrok ETPCz jako orzeczenie stwierdzające niezgodność z prawem prawomocnego orzeczenia sądu cywilnego' [*ECHR Judgment as a Judicial Decision Declaring the Illegality of a Legally Final Civil Court Ruling*], *Europejski Przegląd Sądowy* (2010) no. 8 *passim*.

with the advisory opinions. It can be argued that the obligation to consider the opinions, to prevent violations of individual rights or interrupt existing violations, and the obligation not to challenge the interpretation adopted by the Court are exemplifications of the positive realisation of Article 1 of the Convention as well as the obligation to respect the Court's authority.[65] These obligations apply to the same extent to requesting courts and tribunals and to other national authorities.[66]

Concluding Remarks

Introduction of a new advisory competence of the Court fits in well in the general direction of reforms of the Strasbourg system for human rights protection. As indicated in the article, certain provisions related to the new procedure can be open to different interpretations, but an analysis of both the text of Protocol No. 16 and its legal context helps clarify most of the ambiguities.

In our opinion, advisory opinions may become a useful instrument of dialogue between the Court and national authorities that would enhance the Convention's impact on national legal systems. They may also help to clarify the Strasbourg jurisprudence in certain areas or even to develop the case-law. Full assessment of their relevance and importance in the Convention system will depend on the national courts' activity and the Strasbourg Court's goodwill in a multilevel human rights dialogue.

[65] *See* accordingly A. Bodnar, 'Res Interpretata: Legal Effect of the European Court of Human Rights' Judgments for Other States Than Those Which Were Party to the Proceedings', in Y. Haech and E. Brems (eds.), *Human Rights and Civil Liberties in the 21st Century* (Dordrecht 2014) p. 223-262.

[66] *See* accordingly Paprocka, *supra* n. 46, p. 80-85. Some authors emphasise that due to their nature, advisory opinions will strengthen the *erga omnes* effectiveness of the Court's case-law (*see* e.g. Sicilianos, *supra* n. 3, p. 26).

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